Supreme Court, U.S.
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Case No: 00-1938

IN THE
SUPREME COURT OF THE UNITED STATES

LESTER L. WELLS, *Petitioner,*

v.

MICHAEL W. MOORE, Secretary, Department of Corrections, State of Florida, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner, Wells, presents the following question to this Court:

> Whether a trial judge has the obligation to disqualify retained counsel when presented with a conflict of interest which undermines the integrity of the trial proceedings and the defendant seeks to waive the conflict.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE AND FACTS 3

REASONS FOR DENYING THE WRIT 5

CONCLUSION 9

TABLE OF AUTHORITIES

Cases — Page(s)

City of Canton, Ohio v. Harris,
489 U.S. 378 (1989) 2

Cuyler v. Sullivan,
446 U.S. 335 (1980) 5

Maryland v. Louisiana,
451 U.S. 725 (1981) 8

Patrick v. Burget,
486 U.S. 94 (1988) 2

United States v. Garcia,
517 F.2d 272 (5th Cir. 1975) 2,3

United States v. Martinez,
630 F.2d 361 (5th Cir. 1980) 2,4

Williams v. Taylor,
529 U.S.362, 120 S. Ct. 1495,
146 L. Ed. 2d 389 (2000) 8

DOCKETED CASES

Weeks v. Moore,
Eleventh Circuit Case No. 00-12781-HH 3

FEDERAL STATUTES

28 U.S.C. §1254 2

28 U.S.C. §1254(1) 2

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OPINION BELOW

The decision from which Petitioner seeks to invoke the discretionary review of this Court is an unpublished affirmance issued by the Eleventh Circuit Court of Appeals on February 14, 2001. (A 2-4).[1] The decision affirmed a District Court's unreported order denying habeas relief. (A 9-10).

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[1] The symbol"A" followed by the appropriate number represents a citation to the materials contained in the Petitioner's Appendix to his petition.

JURISDICTION

Wells seeks review pursuant to 28 U.S.C. §1254(1) of a unpublished decision of the Eleventh Circuit filed on February 14, 2001. This Court has jurisdiction.

In order to obtain review under 28 U.S.C. §1254(1), a petitioner is usually required to show that the court of appeals was presented with the question raised in his or her petition as a distinct ground for relief and that the court of appeals passed on the question in reaching its decision. City of Canton, Ohio v. Harris, 489 U.S. 378, 386 n.5 (1989); Patrick v. Burget, 486 U.S. 94, 99 n.5 (1988). This Wells cannot do.

The district court issued a certificate of appealability on two limited issues: 1) whether petitioner was denied his constitutional right to effective assistance of counsel due to a conflict of interest based on dual representation of co-defendants by the same law firm, as in United States v. Garcia, 517 F.2d 272 (5th Cir. 1975); and 2) whether petitioner was denied his constitutional right to effective assistance of counsel due to a conflict of interest based on the law firm's prior representation of an adverse witness, as in United States v. Martinez, 630 F.2d 361 (5th Cir. 1980). (A 5-7). The Eleventh Circuit decided that petitioner knowingly, voluntarily, and intelligently waived the alleged conflicts of counsel from (1) the paired representation of co-defendants and (2) the representation of a prosecution witness by counsel's law firm. (A 2-4). No other issues were decided by the Eleventh Circuit. Thus, the question presented herein, which was not passed upon by the Eleventh Circuit, should not be entertained by this Court.

Respondent maintains that petitioner has failed to establish a basis under 28 U.S.C. §1254 for certiorari review on his proposed question for review as this claim was not presented as a distinct basis for relief to, or passed on by, the Eleventh Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts petitioner's list of constitutional and statutory provisions.

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's rendition of the history of the case with the following additions.

Petitioner and co-defendants were involved in growing marijuana, and suspected that James Wyche and his son, Billy Wyche, had stolen marijuana from them. (R1-9-3)[2]. Petitioner and co-defendant Jerry Wayne Weeks kidnapped Billy Wyche, bound him, locked him in a car trunk, and pushed the car into a river. (R1-9-3). Billy Wyche survived. (R1-9-4). Petitioner and Weeks were charged with kidnapping, pleaded [not] guilty, and were released on bond. (R1-9-4). The Wyches were thus key potential witnesses. (R1-9-4). Petitioner and Weeks ambushed the Wyches and their friend, Phillip Wayne Enfinger, while they were on a hunting trip. James Wyche and his son, Billy Wyche, were killed; however, Mr. Enfinger survived his injuries. Mr. Enfinger testified that he had known Petitoner and Weeks for approximately 20 years and that he was positive that they were the shooters. (R1-19-2).

In his federal habeas petition and in the Eleventh Circuit, Wells raised only the issues of whether he was denied his constitutional right to effective assistance of counsel due to a conflict of interest based on dual representation of co-defendants by the same law firm, as in United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), and whether he was denied his constitutional right

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[2] Record references are to Weeks v. Moore, Eleventh Circuit Case No. 00-12781-HH.

to effective assistance of counsel due to a conflict of interest based on the law firm's prior representation of an adverse witness, as in United States v. Martinez, 630 F.2d 361 (5th Cir. 1980). (A 2-4, 5-7, 60).

REASONS FOR DENYING THE WRIT

THE DECISION OF THE COURT BELOW IS THE CORRECT STATEMENT OF THE LAW AND THUS ISSUANCE OF THE WRIT SHOULD BE DENIED.

In his petition for a writ of certiorari, Wells contends that this Court should grant review of the unpublished decision of the Eleventh Circuit affirming the District Court as the decision resolved an important question of federal constitutional law. The Respondent disagrees and urges this Court to deny review.

Petitioner raised below, in the District and Circuit Courts, issues of ineffective assistance of counsel predicated upon his counsel's alleged conflict of interest based on dual representation of co-defendants by the same law firm and an alleged conflict of interest based on the law firm's prior representation of an adverse witness. The essence of the claim was that he had not knowingly, voluntarily, and intelligently waived the alleged conflicts of interest. There is no question that the state and federal courts applied the correct case law to this issue for the issue was evaluated in terms of whether there was an actual conflict of interest that adversely affected counsel's performance as mandated by Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). (A 22 & 79).

The state trial court held an evidentiary hearing encompassing four days on petitioner's post-conviction claims of ineffective assistance of counsel and found that Wells had not established that an actual conflict of interest occurred under the facts of the case, and that even if there was such a conflict it was waived by petitioner. (A 81). At the evidentiary hearing, Petitioner's trial counsel, James Judkins, testified that Petitioner told him that he was not guilty, that he was not present at the scene of the crime, and had no information that would be helpful or harmful to any other persons. Mr. Judkins also testified that he did not feel restricted in his representation of Petitioner regarding

negotiated pleas because he had determined from Petitioner that even if he entered a plea it could not impact on any of the other three defendants because Petitioner did not have any information concerning the shooting. Mr. Judkins additionally testified that no opportunity existed to shift the burden from Petitioner to the co-defendant, Jerry Wayne Weeks. He stated that the opportunity did not exist during the first complete trial when there were separate attorneys and there was no reason to believe that it would exist in the second trial. He further testified that he did not refrain from cross-examining any witnesses due to prior representation of Petitioner's co-defendants. Finally, he testified that he would have withdrawn had he thought that there was a real possibility of a conflict. (A 84-85).

Larry Simpson, trial counsel for Petitioner's co-defendant, testified at the evidentiary hearing that the strategy was always for Petitioner to put on all the evidence and Weeks to put on no evidence in order to obtain closing argument. Again, this was the same strategy used by Petitioner's independent counsel during the first complete trial. (A 82-83).

Based on this testimony, the State court determined that Petitioner had failed to prove an actual conflict of interest based on the tactical and strategic decisions made by his trial counsel, because there was no evidence that his counsel adopted a theory of defense which was affected by conflicting representation. (A 78).

As to Petitioner's waiver of any alleged conflict, at their first trial, Petitioner and Weeks were represented by LaDon Dewrell and James Burke, attorneys from the same law firm. After an adverse ruling by the court regarding opening and closing statements, Mr Dewrell requested that he be allowed to withdraw from any further representation of Weeks. Mr. Dewrell advised the court that he had discussed the court's ruling with Weeks and Mr. Burke had discussed the matter with Petitioner, and that both defendants had decided to avail themselves of conflict free individual representation. At that time a mistrial was declared. At

the second trial, Petitioner and Weeks were represented by independent counsel. At the third trial, notwithstanding their clear understanding of their right to conflict free representation, Petitioner and Weeks again chose to be represented by counsel from the same law firm, Mr. Judkins and Mr. Simpson. (R1-9-ex.H-p.8). Prior to the third trial, the Honorable Clyde Wells held a conflict hearing to determine if the parties were aware of any potential conflict of interest in being represented by members of the same firm. Judge Wells thoroughly questioned Petitioner and Weeks as to whether they understood the conflict situation and were aware of the consequences of waiving their right to conflict free counsel. Judge Wells, who presided over the two previous trials, determined that the waivers were valid. (R1-9-ex.F-pp.12-17).

At the evidentiary hearing on Petitioner's post-conviction motion, Petitioner's trial counsel, Mr. Judkins, testified that at the conclusion of the conflict of interest hearing conducted by Judge Wells, he believed that any potential conflict of interest had been waived and that he had tried to counsel petitioner regarding that issue sufficiently to prevent it from being raised in post-conviction relief proceedings later on. (R1-19-15). Based on the evidence presented during the evidentiary hearing, the state court determined that if in fact there was a conflict of interest, that any conflict was freely, voluntarily, and intelligently waived after Petitioner was made aware of said conflict. (A 85).

In ruling on the federal habeas petition, the federal magistrate reviewed the state court record and also found "that there was at most only a possible conflict; that there was an effective waiver of any conflict; that there was in fact no actual conflict; and that even if there were an actual conflict, it did not adversely affect the adequacy of petitioner's legal representation." (A 25). The District Court adopted the ruling of the Magistrate that Wells had failed to demonstrate that the alleged conflicts adversely affected the adequacy of his legal representation. (A 10 & 67). The Eleventh Circuit found that petitioner knowingly,

voluntarily, and intelligently waived the alleged conflicts of counsel from (1) the paired representation of co-defendants and (2) the representation of a prosecution witness by counsel's law firm. (A 2-4). Whether one applies the limited review standards set out by the majority in Williams v. Taylor, 529 U.S.362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), or whether independent federal review is available, Wells still had to show that any alleged conflict adversely affected the adequacy of his legal representation. Wells has not and cannot show that the adequacy of his legal representation was adversely affected by any alleged conflict.

Rather than present this Court with a question of federal law as to whether he had actually shown that his legal representation was adversely affected by the alleged conflicts or whether his waiver of the alleged conflicts had been valid, petitioner has chosen to present this Court with a question that presumes that an actual conflict existed that impugned the integrity of petitioner's trial making disqualification mandatory. (A 18). Petitioner does not disclose that the state trial court and the federal district court, in their roles as factfinders, both made the determination that there had been no actual conflict. (A 60 & 81). For this Court to answer the question posed by Petitioner, this Court must make a contrary factual determination; however, this Court is "not suited to functioning as a *nisi prius* tribunal." Maryland v. Louisiana, 451 U.S. 725, 761 (1981) (REHNQUIST, J., dissenting). Questions such as petitioner's, that require this Court to act as a factfinder, are precisely why this Court generally refuses to review a claim that was not presented as a distinct basis for relief to, or passed on by, the lower courts. Accordingly, the state maintains that as these issues were not presented as a distinct basis for relief to, or passed on by, the Eleventh Circuit, they are not subject to review.

Furthermore, petitioner has failed to show that the decision of the Eleventh Circuit meets any of the criteria for review by certiorari set out in Rule 10, Rules of the Supreme Court. Therefore, review should be denied.

CONCLUSION

Based on the above cited legal authorities and arguments, the respondent respectfully requests this Honorable Court to deny Mr. Well's petition for a writ of certiorari.

Respectfully submitted,

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